

Attorney Docket No.: J6834(C)
Serial No.: 10/667,922
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BRIEF FOR APPELLANT

Sir:

This is a Brief on appellant's Appeal from the Examiner's Final Rejection concerning the above-identified application.

The Commissioner is hereby authorized to charge any additional fees, which may be required to our deposit account No. 12-1155, including all required fees under: 37 C.F.R. §1.16; 37 C.F.R. §1.17; 37 C.F.R. §1.18.; 37 C.F.R. §1.136.

BRIEF FOR APPELLANT

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I. REAL PARTY IN INTEREST

Unilever Home & Personal Care USA, Division of Conopco, Inc. is the real party in interest.

II. RELATED APPEALS AND INTERFERENCES

There are no other prior or pending appeals or interferences or judicial proceedings known to appellant, the appellant's legal representative, or assignee which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending Appeal.

III. STATUS OF CLAIMS

Claims 1-6 and 8-17 are rejected and subject to the present Appeal. Claim 7 has been canceled.

IV. STATUS OF AMENDMENTS

No amendments were submitted after the Final Rejection. Thus, claims 1-6 and 8-17 are appropriate for appellate review.

V. SUMMARY OF CLAIMED SUBJECT MATTER

Claim 1 concerns a solid cosmetic composition having the features of (i) a water dissolvable solid carrier comprising a destructureized starch; (ii) a fragrance deposited onto the destructureized starch; and (iii) at least one cosmetic agent incorporated into the

solid carrier. See page 3 of the specification at paragraph [0008]. The destructure starch is identified as a zeamays starch. See reference to corn starch at page 5, paragraph [00014] and original claim 2. The at least one cosmetic agent is present in an amount from about 0.001 to about 50% by weight. See original claim 7 and page 17 at paragraph [00032].

Claim 2 identifies the solid carrier as zeamays starch. This is an original claim. Since the element now appears in claim 1, the claim is subject to cancellation.

Claim 3 identifies the composition as being in a form selected from tablets, pellets, beads or sheets. See the Abstract of the Disclosure and original claim 3.

Claim 4 identifies the cosmetic agent as a surfactant, emollient, humectant, conditioner, sunscreen, anti-aging active or mixtures thereof. See the specification at page 18, paragraph [00033].

Claim 5 details the composition as being in a honeycomb shape. See the specification at page 6, paragraph [00017].

Claim 6 further identifies the honeycomb as being formed from a plurality of sections, each of the sections defined by a fracturable perimeter allowing separation of the section from the honeycomb. Note page 6 at paragraph [00017] and original claim 6.

Claim 8 identifies the fragrance as present in an amount from about 0.001 to about 10% by weight of the composition. See the specification at page 17 under paragraph [00030].

Claim 9 identifies the destructurez starch as being present in an amount from about 10 to about 100% by weight of the solid carrier. See the specification at page 7 under paragraph [00019].

Claim 10 is an independent claim reciting a foamed solid cosmetic composition. This composition includes (i) a water dissolvable foamed solid carrier comprising a destructurez starch; (ii) a fragrance deposited onto the destructurez starch; and (iii) at least one cosmetic agent incorporated into the foamed solid carrier. See page 3 at paragraph [0008] noting the preference for the foamed variant of a solid cosmetic composition. The destructurez starch is a zea mays starch. See original claim 2. The at least one cosmetic agent is present in an amount from about 0.001 to about 50% by weight. See page 17 at paragraph [00032].

Claim 11 is the third of the independent claims. Therein is recited a solid cosmetic composition that includes: (i) a water dissolvable foamed solid carrier comprising a destructurez starch; (ii) a fragrance deposited onto the destructurez starch; and (iii) at least one cosmetic agent incorporated into the foamed solid carrier. See the specification at page 3 under paragraph [0008]. The destructurez starch is identified as zea mays starch. See reference to corn starch at page 5 under paragraph [00013] and original claim 2. The at least one cosmetic agent is present in an amount from about 0.001 to about 50% by weight. See the specification at page 17 under paragraph [00032].

Claim 12 is dependent through claim 1 and identifies the destructurez starch as a molecularly homogeneous material with both amylase and amylopectin dispersed uniformly throughout the material and is amorphous having no ordered molecular structure. See the specification at page 4 under paragraph [00011].

Claim 13 is dependent through claim 12 and recites an amylase content of at least 45% by weight of the material. See the specification at page 5 under paragraph [00013].

Claim 14 recites a foamed solid cosmetic dependent through claim 10 wherein the destructureized starch is a molecularly homogeneous material with both amylase and amylopectin dispersed uniformly throughout the material and is amorphous having no ordered molecular structure. See the specification at page 4 under paragraph [00011].

Claim 15 recites a foamed solid cosmetic composition dependent through claim 14 wherein amylase content is at least 45% by weight of the material. See the specification at page 5 under paragraph [00013].

Claim 16 recites a solid cosmetic composition dependent through claim 11 wherein the destructureized starch is a molecularly homogeneous material with both amylase and amylopectin dispersed uniformly throughout the material and is amorphous having no ordered molecular structure. See the specification at page 4 under paragraph [00011].

Claim 17 recites a solid cosmetic composition dependent through claim 16 wherein amylase content is at least 45% by weight of the material. See the specification at page 5 under paragraph [00013].

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

Are claims 1, 4 and 8-11 rejectable as being an obviousness-type double patenting over claims 1-2 of U.S. Patent Application Publication bearing Serial No. 10/597,608 (Barrow et al.)?

Are claims 1-6 and 8-17 obvious under 35 U.S.C. § 103(a) over U.S. Patent 5,925,380 (Roulier et al.) in view of U.S. Patent 6,248,338 (Muller et al.) and further in view of U.S. Patent 5,382,611 (Stephoe et al.)?

VII. APPELLANT'S ARGUMENTS

Are claims 1, 4 and 8-11 rejectable as being an obviousness-type double patenting over claims 1-2 of U.S. Patent Application Publication bearing Serial No. 10/597,608 (Barrow et al.)?

The Publication with Serial No. 10/697,608 lacks essential features of the present claims 1, 4 and 8-11. The Publication claims lack mention of any solid carrier. Secondly, the Publication claims fail to disclose fragrance that is deposited onto any form of solid carrier much less a carrier constituted of destructureized starch. For these reasons appellant considers this rejection inappropriate.

Appellant's distinctions over the Barrow et al. claims were found unpersuasive to the Examiner. She has focused on the general statement that fragrances may also be included in the compositions of Barrow et al. at levels ranging from about 0.05 to about 5%, preferably between 0.1 and 3% by weight. Attention was drawn to the specification at page 14, paragraph 43. Beyond the generic mention, the word "fragrance" appears in

only one further instance. It is found in Example 3 within Table V. Therein is delineated an aqueous liquid formulation into which fragrance has been dispersed.

Appellant's claims require that the fragrance be deposited onto a solid carrier. Based on the disclosure in Barrow et al., the skilled chemist would obtain no teaching nor have motivation to place fragrance other than within a formula. Deposition onto a surface of a solid starch is simply beyond the reference.

Appellant's second distinction also has been rejected as being nonpersuasive. Barrow et al. lacks any mention of a solid carrier, much less a carrier constituted of destructure starch. The Examiner counters that cosmetic compositions may generally have a solid, emulsion or liquid base. She cites the Abstract of U.S. Patent 5,382,611 (Steptoe et al.).

In essence, the Examiner rejects appellant's claims over a combination of the Barrow et al. publication with that of Steptoe et al. Appellant submits that even with the combination of art, a skilled person would still not arrive at the claimed invention.

Barrow et al. U.S. '608 is about liquid compositions. The chemically modified starches disclosed therein are dissolved in aqueous liquids, many of which may be liquid emulsions. See all of the Examples. There are no solid compositions. Neither is the disclosed starch in a solid carrier state. Fragrances are formulated into these liquid systems.

Were a skilled chemist to utilize the starch materials of Steptoe et al., this chemist would dissolve the starch into the liquid systems of U.S. '608. There would be no resultant solid cosmetic. Neither would the fragrance of U.S. '608 be deposited onto the

Step toe destructure starch. Fragrance would be dissolved in the liquid phases. By contrast, appellant claims a fragrance that it is deposited onto rather than into a cosmetic.

Further, the Examiner contends that any time one heats starch the result is a destructure version. This is not so. Step toe accomplishes destructure through use of an injection molding machine or extruder. Elevated temperatures and pressures are utilized to achieve the destructure. See column 1, lines 16-22. A somewhat milder approach was achievable by Step toe et al. through use of catalysts. But this still required a closed system with elevated temperatures. See column 1, lines 49-55. No such treatment is performed by U.S. '608.

Are claims 1-6 and 8-17 obvious under 35 U.S.C. § 103(a) over U.S. Patent 5,925,380 (Roulier et al.) in view of U.S. Patent 6,248,338 (Muller et al.) and further in view of U.S. Patent 5,382,611 (Step toe et al.)?

Appellant's invention is distinguished from the references by the feature of fragrance being deposited onto the solid destructure starch carrier. Neither Rouiller et al., Muller et al. nor Step toe et al. disclose this feature. A *prima facie* case of obviousness has not been established.

The Examiner has acknowledged this argument but considered it not persuasive. Yet no reasoning has been provided in her rebuttal.

The only comment relative to the fragrance issue is found at page 8 of the Final Office Action. It appears that the Examiner presumes that a *prima facie* case has been

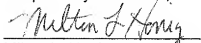
established regarding the deposition onto the solid carrier. But the reason has not been enunciated.

Instead, the Examiner simply skips to the comparative Example 21. This comparative showing is peremptorily dismissed because of "the limited scope of the study".

Appellant's view is that with the Examiner failing to establish a *prima facie* case of obviousness, appellant has no burden of demonstrating unobvious results. Nonetheless, appellant has provided a showing in Example 21 that deposition onto a destructurized starch in comparison to placement onto a non-destructurized starch resulted in a fragrance evolution over a more prolonged period of time. While the showing may not be as robust as the Examiner might prefer, nevertheless it is a demonstration of unexpected results. Even if the Examiner believes a *prima facie* case has been presented (which appellant disagrees with), the Examiner nonetheless must present cogent reasons for dismissing the comparative experiments. It is inappropriate to simply ignore it.

In view of the foregoing comments, appellant requests the Board of Appeals and Interferences to reverse the rejections and instruct the Examiner to allow the claims.

Respectfully submitted,



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201-894-2403

VIII. CLAIMS APPENDIX

Claim 1 A solid cosmetic composition comprising:

- (i) a water dissolvable solid carrier comprising a destructurized *zea mays* starch;
- (ii) a fragrance deposited onto the destructurized starch; and
- (iii) at least one cosmetic agent incorporated into the solid carrier in an amount from about 0.001 to about 50% by weight and wherein the composition is a solid cosmetic.

Claim 2. The composition according to claim 1 wherein the solid carrier is a *zea mays* starch.

Claim 3. The composition according to claim 1 wherein the composition is in a form selected from the group consisting of tablets, pellets, beads and sheets.

Claim 4. The composition according to claim 1 wherein the cosmetic agent is selected from the group consisting of surfactants, emollients, humectants, conditioners, sunscreens, anti-aging actives and mixtures thereof.

Claim 5. The composition according to claim 1 which is in a honeycomb shape.

Claim 6. The composition according to claim 5 wherein the honeycomb is formed from a plurality of sections, each of the sections defined by a fracturable perimeter allowing separation of the section from the honeycomb.

Claim 8. The composition according to claim 1 wherein the fragrance is present in an amount from about 0.001 to about 10% by weight of the composition.

Claim 9. The composition according to claim 1 wherein the destructurized starch is present in an amount from about 10 to about 100% by weight of the solid carrier.

Claim 10. A foamed solid cosmetic composition comprising:

- (i) a water dissolvable foamed solid carrier comprising a destructurized zeamays starch;
- (ii) a fragrance deposited onto the destructurized starch; and
- (iii) at least one cosmetic agent incorporated into the foamed solid carrier in an amount from about 0.001 to about 50% by weight and wherein the composition is a foamed solid cosmetic.

Claim 11. A solid cosmetic composition comprising:

- (i) a water dissolvable foamed solid carrier comprising a destructurized zeamays starch;
- (ii) a fragrance deposited onto the destructurized starch; and
- (iii) at least one cosmetic agent incorporated into the foamed solid carrier in an amount from about 0.001 to about 50% by weight and wherein the composition is a solid cosmetic.

Claim 12. A composition according to claim 1 wherein the destructurized starch is a molecularly homogeneous material with both amylase and amylopectin dispersed uniformly throughout the material and is amorphous having no ordered molecular structure.

Claim 13. The composition according to claim 12 wherein amylase content is at least 45% by weight of the material.

Claim 14. The foamed solid cosmetic composition of claim 10 wherein the destructurized starch is a molecularly homogeneous material with both amylase and amylopectin dispersed uniformly throughout the material and is amorphous having no ordered molecular structure.

Claim 15. The foamed solid cosmetic composition of claim 14 wherein amylase content is at least 45% by weight of the material.

Claim 16. The solid cosmetic composition according to claim 11 wherein the destructurized starch is a molecularly homogeneous material with both amylase and amylopectin dispersed uniformly throughout the material and is amorphous having no ordered molecular structure.

Claim 17. The solid cosmetic composition according to claim 16 wherein amylase content is at least 45% by weight of the material.

IX. EVIDENCE APPENDIX

None.

X. RELATED PROCEEDINGS APPENDIX

None.